UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,

Debtor.

Chapter 11
Case No. 13-10670-PGC

CANADIAN PACIFIC RAILWAY COMPANY'S OBJECTION TO THE DISCLOSURE STATEMENT REGARDING THE TRUSTEE'S MARCH 31, 2015 PLAN OF LIQUIDATION

Introduction

Canadian Pacific Railway Company (CP) objects to the disclosure statement. Not only does the trustee fail to provide "adequate information," as required by section 1125 of the Bankruptcy Code, the plan it describes cannot be confirmed.

Although disclosure statement issues are usually resolved by negotiation, this is a different case. The plan pushes the boundaries of bankruptcy law beyond the limits. Instead of comprehensively informing creditors, the disclosure statement conceals more than it clarifies. Key settlement terms are deliberately withheld. In a case that lacks rehabilitative purpose and hopes to pay creditors a fraction of their claims, the disclosure statement pays no more than lip service to sweeping third party releases. And if that were not enough, the plan conditions confirmation on the finality of orders entered by Canadian and United States courts whose authority to afford such relief is, at best, questionable. In the end, despite its length, the disclosure statement is largely boilerplate.

In light of its many inadequacies, as well as plan non-confirmability, the disclosure statement does not pass muster. Undertaking the burden and expense of plan distribution, vote

solicitation, discovery, and confirmation are not warranted when a disclosure statement omits critical information and trumpets an unconfirmable plan.

Legal Discussion

I. The adequate information requirement

Section 1125(b) prohibits solicitation of votes for a plan unless accompanied by a court-approved disclosure statement containing "adequate information."

> 'Adequate information' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . ..

11 U.S.C. § 1125(a)(1).

The disclosure statement is "intended by Congress to be the primary source of information upon which creditors and shareholders would make an informed judgment about a plan of reorganization." *In re Jeppson*, 66 B.R. 269, 291 (Bankr. D. Utah 1986). Adequate information is "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355, 362 (3d Cir. 1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414 (3d Cir. 1988)).

Although bankruptcy courts have "discretion to determine on a case by case basis whether a disclosure statement contains adequate information …[,]" *In re Dakota Rail, Inc.*, 104 B.R. 138, 143 (Bankr. D. Minn. 1989), that discretion is not without limits. This Court has "an independent obligation to determine whether a disclosure statement includes adequate information within the meaning of the Bankruptcy Code." *In re E. Me. Elec. Coop*., 125 B.R. 329, 333 (Bankr. D. Me. 1991). Fulsome disclosure is "essential for a party weighing the credibility and merits of the plan," and the statement "must contain factual support of the

opinions." *In re Reilly*, 71 B.R. 132, 134-35 (Bankr. D. Mont. 1987) (quoting *In re Fierman*, 21 B.R. 314, 315 (Bankr. E.D. Pa. 1982)).

Inadequate information

For several reasons the trustee's disclosure statement comes up short.

A. Secret settlement agreements

The disclosure statement fails to attach or meaningfully describe critical settlement agreements. And, most troubling, that cover-up is purposeful.[1] The concealed accords control how creditors will be paid and are purportedly conditioned on sweeping third-party releases and channeling injunctions; such hide-the-ball tactics neither promote "the effective functioning of the federal bankruptcy system" nor recognize "the importance of full and honest disclosure." *Ryan Operations*, 81 F.3d at 362.

1. Settlements under plans

Granted, a reorganization plan can settle claims against a debtor. 11 U.S.C. § 1123(b)(3)(A). But "[i]rrespective of whether a claim is settled as part of a plan pursuant to section 1123(b)(3)(A) of the Bankruptcy Code or pursuant to separate motion under Bankruptcy Rule 9019, the standards applied for approval are the same. The settlement must be fair and equitable and in the best interest of the estate." *In re Best Products Co., Inc.*, 177 B.R. 791, 794 n. 4 (S.D.N.Y. 1995), *aff'd*, 68 F.3d 26 (2d Cir. 1995); *see also In re Ashford Hotels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998) ("The 'range of reasonableness' must encompass several benchmark principles. Foremost, the settlement must be supported by adequate consideration, be

[1] The trustee has separately moved to file the settlement agreements under seal, contending that settling third-parties could be prejudiced if the plan fails and the tort bar learns how much the settlors would pay. CP objects to that attempt. Bankruptcy Code section 107(b)(1), which governs filing under seal, focuses on preventing the disclosure of competitively harmful data, not protecting tortfeasor bargaining positions.

fair and equitable, and be in the best interest of the estate."); *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 758-59 (Bankr. S.D.N.Y. 1992) (Bankruptcy Rule 9019 standards govern).

The trustee completely ignores openness obligations. The disclosure statement fails to reveal settlement amounts, or to evaluate fairness or the estate's best interest. Instead, the trustee blithely assumes satisfaction of those criteria. *See Disclosure Statement* at 53. Settlement equity depends upon: (1) the probability of litigation success; (2) collection effort difficulties; (3) complexity and expense, as well as associated inconvenience and delay; and (4) the interests of creditors and proper deference to their views. *See In re Lion Capital Grp.*, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985); *In re Eagle Bus Mfg., Inc*., 134 B.R. 584, 598 (Bankr. S.D. Tex. 1991), *aff'd* 158 B.R. 421 (S.D. Tex. 1993).

"The settling parties must set forth the facts in sufficient detail that a reviewing court could distinguish it from mere boilerplate approval of the trustee's suggestion." *In re Lion Capital Grp.*, 49 B.R. at 176 (citing *In re Boston & Providence RR Corp.*, 673 F.2d 11, 12 (1st Cir. 1982) and *In re Black Watch Farms, Inc*., 373 F. Supp. 711, 716 (S.D.N.Y. 1974). Without essential facts, CP cannot evaluate whether the plan satisfies Code approval standards. The trustee ultimately wants to solicit votes for what amounts to a sight-unseen plan.

Settlement agreement obfuscation exacerbates the gravity of the trustee's non-disclosure. Plan implementation depends on settlement effectiveness, yet the disclosure statement attaches a single agreement with no assurance of substantive uniformity. *See, e.g.*, *Disclosure Statement* at 54. The remaining accords (at least 21) involve "entities or groups of affiliated entities," identified in name only. *See Disclosure Statement*, Schedule A.

The disclosure statement emphasizes settlement agreement importance. In fact, the agreements are "incorporated into the Plan, as if the same were fully set forth herein." *Id.* at 54. And the undisclosed deals "will apply with respect to the particular parties thereto" so as to overcome "any inconsistency between the Plan or the Confirmation Order and the Settlement Agreement(s)." *Id.* at 73. Despite this paramountcy, the documented arrangements remain cloaked in mystery.

2. Filing under seal

In most cases the interested parties would resolve deficient disclosures. For that reason, in April, CP wrote the trustee in hopes that the settlements would be attached or fully described. Rejecting that entreaty, the trustee, in concert with the Canadian monitor and settlement counterparties (including affiliates), suppressed critical information, even though the off-the-record agreements are said to take precedence over the plan. The trustee goes so far as to seek permission to file critical documents under seal.

Such stealth conflicts with Bankruptcy Code and fundamental public-record-openness principles. Section 107(a) mandates that "a paper filed [] under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). "During a chapter 11 reorganization, a debtor's affairs are an open book and the debtor operates in a fish bowl." *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006).

Section 107(b) provides the only exceptions to section 107(a) transparency. That subsection authorizes sealing to "(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."

As the First Circuit explained:

> [t]ogether, the two components of § 107—the broad right of access created in § 107(a) and the exceptions set forth in § 107(b)—create a framework for determining whether a paper filed in a bankruptcy case is available to the public or subject to protection. Absent § 107, this question would be addressed by reference to the common law. Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed in a bankruptcy case. …
>
> Once the presumption of public access attaches under § 107(a), the next step in the inquiry is ... to determine whether the material at issue falls within a specific exception to the presumption—namely, into one of the § 107(b) categories.

In re Gitto Global Corp., 422 F.3d at 7–8, 10.

"If the § 107(b) exceptions do not apply, the inquiry is complete and the Court's decision will favor public access." *In re FiberMark, Inc.*, 330 B.R. 480, 506 (Bankr. D. Vt. 2005). The trustee fails to show good cause to seal the settlement agreements.

The motion to seal further reveals the necessity of settlement agreement disclosure. The trustee wants to hide supposedly "minor provisions unique to particular Settlement Agreements (*such as certain claims preserved by Released Parties against non-settling parties or insurers*)[.]" Motion to Seal ¶ 14 (emphasis added). CP knows of one such "minor" provision because Irving Oil served a notice of claim, heralding a $75 million (CDN) settlement and reserving recovery rights, while assigning other rights. Hence, at least one covert settlement agreement implicates CP, but CP is left to guess about the specifics. And the World Fuel defendants appear to have entered into a similar, but who can say, release/assignment arrangement.

Other released parties likely reserved or assigned rights as well. Those agreement terms do not constitute scandalous material, trade secrets, or other information protected by section 107(b). Yet the disclosure statement and the trustee's motion would deny CP and others essential

information. Bankruptcy Code protections cannot be invoked and releases cannot be crammed down by proponents who hide critical plan terms from interested party view.

B. Non-compliance with Rule 9019

To the extent the Court has not otherwise blessed the settlements (no motion has been filed), the disclosure statement maintains that entry of the confirmation order tacitly approves agreement fairness, equity, and reasonableness; confirmation will also supposedly decide the best interests of the estate and creditors, as well as settling party good faith. *Disclosure Statement* at 53. But approval of sealed agreements violates Rule 9019, requiring that interested parties receive notice of any settlement. Due process demands that all interested parties be given the opportunity to evaluate debtor settlements. How else can CP determine whether the plan is fair and equitable? How can it decide whether to object without knowing the deals the estate has struck?

Likewise, how can CP gauge feasibility? The disclosure statement conditions settlement agreement enforceability on various occurrences, but no effectiveness conditions are revealed. *See Disclosure Statement* at 53. On top of that, the disclosure statement asserts that neither the plan nor the confirmation order prevents a released party from exercising termination rights "as provided for under such Settlement Agreement." *Id.* at 53-54. But the trustee wants to keep the voidable contracts and counter-party termination rights confidential. CP and other parties are reduced to guessing about settlement operativeness, let alone the consequences of any termination on the estate and the creditors.

C. No liquidation analysis

"The best interests of creditors test requires that the debtor demonstrate that creditors will fare at least as well in Chapter 11 as they would in Chapter 7." *In re Zaruba*, 384 B.R. 254, 262 (Bankr. D. Ak. 2008); *see* 11 U.S.C. §§ 1129(a)(7) and 1173(a)(2). The debtor bears burden of

showing reorganization superiority. *Id.* Thus plan approval depends upon the inclusion of a liquidation analysis. Such a comparison enables impaired classes to determine that they will receive at least as much as they would in a chapter 7 liquidation. *See In re Sierra-Cal*, 210 B.R. 168, 176 (Bankr. E.D. Cal. 1997) ("[E]very plan proponent who would rely on the 'best interests' test must include a liquidation analysis in the disclosure statement."). Merely saying that creditors' claims will be satisfied or assuring that the best creditor recovery will be realized is not enough. *In re Zaruba*, 384 B.R. at 262.

The disclosure statement references a "Liquidation Analysis", *see Disclosure Statement* at 102, but fails to undertake such an evaluation. This omission precludes approval. A creditor has no way of knowing what a hypothetical chapter 7 liquidation might afford. At a minimum, the trustee must disclose available assets (absent from the disclosure statement) and assess potential actions, claims, and expenses, complete with an allocation of funds among the various claimant classes.

The plan designates classes of claims whose priority status could be affected in a Chapter 7 case, but no liquidation analysis accounts for the property and claims that a Chapter 7 would entail. *See, e.g.*, *In re Washington Mut., Inc.*, 442 B.R. 314, 359-60 (Bankr. D. Del. 2011) (liquidation analysis should not consider third-party releases because "there is no mechanism under chapter 7 to grant third party releases to non-debtors"). Without a liquidation analysis creditor best interests cannot be weighed.

D. MMA not discharged

The disclosure statement misleads regarding an MMA discharge. Plan section 10.2 states that, except as provided Bankruptcy Code Section 1141(d)(3), after the effective date, the plan binds all creditors, equity interest holders, the debtor, and respective successors and assigns regardless of whether the creditor has filed a claim or accepted the plan. And without consent

section 10.5(b)(ii) of the plan releases various parties from claims of creditors receiving consideration under the plan.

A debtor cannot be discharged if (1) the reorganization plan liquidates all or substantially all estate property, (2) the debtor does not engage in business after plan consummation, and (3) section 727(a) would deny the debtor a chapter 7 discharge. 11 U.S.C. § 1143(d)(3). This case presents all three factors: the plan would liquidate MMA's assets; MMA will not conduct business after plan consummation; and section 727(a) would not entitle MMA, a non-individual, to a discharge. The disclosure statement must clearly state that MMA will not be discharged, and any creditor release must be consensual.

E. Claim treatment

Disclosure statements that can be "characterized as being essentially a summary of the plan [have been] held to be clearly inadequate to meet the requirement of Section 1125." *See, e.g.*, *In re Microwave Prods. of Am., Inc.*, 100 B.R. 376, 378 (Bankr. W.D. Tenn. 1989) (citing *In re Adana Mortg. Bankers, Inc.*, 14 B.R. 29 (Bankr. N.D. Ga. 1981)). Trustee Keach's disclosure statement does no more than summarize the plan. CP and other creditors must know the why of claims treatment, not just the how. Without such an explanation, the disclosure statement wants for adequacy.

1. Administrative expenses

"Although what constitutes 'adequate information' will vary from case to case, a good faith estimate of administrative expenses, incurred and upcoming, is a virtual constant." *In re Oxford Homes, Inc.*, 204 B.R. 264, 269 (Bankr. D. Me. 1997). "Creditors deserve to be fairly informed of the transaction costs entailed in the reorganization plan they are being asked to back." *Id.* Nevertheless, the plan purports to treat personal injury and wrongful death claims as non-administrative expense claims. The Bankruptcy Code, however, designates such claims as

administrative. Hence, the number of claims and the amount of the estate's assets that will be allocated to pay administrative expenses is not clear. Apparently Trustee Keach will pay himself, but the scope of other administrative expenses is less than clear.

2. Impairment status

Section 1124 defines impairment: "[e]xcept as provided in section 1123(a)(4) of this title, a class of claims ... is impaired under a plan unless, with respect to each claim ... the plan" treats the claim in one of two ways. This provision establishes a presumption of impairment with specified exceptions. The first applies when the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim ... entitles the holder of such claim...." 11 U.S.C. § 1124(1). In other words, the plan does not affect a claimant's right to payment. The second exception builds on the first, allowing for a single alteration—debt deceleration following a default. 11 U.S.C. § 1124(2). The introductory clause creates a third exception, *i.e.*, non-impairment to the extent a claimant agrees. 11 U.S.C. § 1124 (referencing 11 U.S.C. § 1123(a)(4)).

The disclosure statement and plan deem Classes 1 through 7 to be unimpaired and not entitled to vote. The disclosure statement does not, however, reveal whether the treatment of such classes equates with non-impairment. Because impaired classes must be allowed to vote and purportedly will be crammed down if they reject the plan, the disclosure statement should detail secured-class-claim treatment.

CP has not made a secured claim, but the railroad does assert administrative and unsecured claims. The proper characterization of secured-class impairment would enable CP to evaluate the likelihood of MMA's success in a cram-down contest, which in turn would more accurately reveal distribution prospects.

3. Class 14 claim silence

The plan affords nothing to Class 14 claims. *Disclosure Statement* at 8. The disclosure statement does not identify those "subordinated" claims. This leaves creditors, including CP, to wonder whose claims will deemed subordinated or be subjected to equitable subordination. The disclosure statement must provide more information regarding claim subordination so voting rights can be determined.

4. Class 13 claims distribution meaningless

The disclosure statement lists Class 13 general unsecured creditor distribution ranges of between 3% and 71%. Class 13 claimants assert aggregate claims of $22 million, taking settlement agreement releases into account. The expansiveness of this range renders the disclosure meaningless. No general unsecured creditor, including CP, can make an informed judgment about plan acceptance when faced with a 68% swing in projected distributions.

5. Moral Damages and Personal Injury claims

The Bankruptcy Code requires that individual or personal representative claims for personal injury or death "shall be paid as an administrative expense[.]" 11 U.S.C. § 1171(a). Yet the disclosure statement inexplicably relegates all Wrongful Death, Moral Damages, and Personal Injury claims to Class 12 and Class 8; those claimants "shall not be Allowed Administrative Expense Claims." *Disclosure Statement* at 46. The trustee never explains this anomaly.

Administrative expense claims "except to the extent that the holder of a particular claim has agreed to a different treatment of such claim," must provide "the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim." 11 U.S.C. § 1129(a)(9)(A). Nonetheless, neither the disclosure statement nor the plan indicates whether wrongful death and personal injury claimants agreed to forgo administrative expense treatment.

To the extent that secret settlements obligate these claimants to take less than allowed amounts, those agreements should be disclosed.

F. Available assets and values

An adequate information analysis depends on an accounting of the debtor assets and values. *See, e.g.*, *Dakota Rail*, 104 B.R. at 142. Despite this requirement, the disclosure statement omits a basic inventory. Without such information the parties cannot determine what is available for distribution.

G. Chapter 15 recognition

The disclosure statement makes a Chapter 15 proceeding recognition a material, non-waivable condition to plan confirmation. *Disclosure Statement* at 70. But regarding the future Chapter 15 case, the trustee says no more than the following: "Under the Settlement Agreements, the Monitor will also seek to obtain enforcement of the sanction order with respect to the CCAA Plan through filing a chapter 15 case for MMA Canada in the Bankruptcy Court and seeking an order in aid of enforcing the CCAA Plan sanction order pursuant to Chapter 15." *Id.* at 88. This material-plan-condition disclosure is woefully deficient, especially since, as explained below, foreign railroads cannot invoke Chapter 15. *See* 11 U.S.C. § 1501(c).

II. The Plan is not confirmable

The disclosure statement fails because the Court cannot approve the plan. If a disclosure statement describes a "fatally flawed" plan for which confirmation is "impossible," a court should refuse to consider disclosure adequacy. *In re E. Me. Elec. Coop.*, 125 B.R. at 333 (citing *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990); *In re Monroe Well*

Service, Inc., 80 B.R. 324 (Bankr. E.D. Pa. 1987); *In re Pecht*, 57 B.R. 137 (Bankr. E.D. Va. 1986)).[2]

When considering disclosure adequacy, the court ordinarily "must distinguish between 1) whether the disclosure statement contains adequate information to allow the typical creditor to make an informed decision on how to vote, and 2) whether the Plan can be confirmed." *Dakota Rail*, 104 B.R. at 143. "[W]here the disclosure statement on its face relates to a plan that cannot be confirmed … the court [has] an obligation not to subject the estate to the expense of soliciting votes and seeking confirmation of the plan; otherwise, confirmation issues are left for later consideration." *Id.* (citing *In re Pecht*, 57 B.R. at 139). "Allowing a facially nonconfirmable plan to accompany a disclosure statement is both inadequate disclosure and a misrepresentation." *Id.*

A threshold plan confirmability determination "is appropriate because undertaking the burden and expense of plan distribution and vote solicitation is unwise and inappropriate if the proposed plan could never be legally confirmed." *E. Me. Elec. Coop.*, 125 B.R. at 333; *Id.* at 334 (declining to consider disclosure adequacy when "the disclosure statement describes a plan of reorganization the ultimate failure of which is assured. In light of the facts clearly established by a well-developed record, [debtor's] plan exhibits defects that cannot be cured by balloting").

A. Bankruptcy Code contravention

A court "shall confirm a plan only if … [t]he plan complies with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). The proposed plan violates a host of Code provisions, including section 1173's best interest of creditors test, section 1129(a)(11)'s feasibility test, section 1171(a)'s requirement that death and personal injury claims be treated as administrative expenses, and section 1129(b)(1)'s prohibition against unfair discrimination.

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[2] If the Court sustains CP's objections, the confirmation process would be halted. If the Court overrules those objections, they are preserved for adjudication at confirmation.

B. The CCAA approval order and Chapter 15 recognition and enforcement

1. Chapter 15 does not apply

Congress enacted Chapter 15, titled Ancillary and Other Cross-Border Cases, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The legislation adopts the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law. Chapter 15 replaced Code section 304.

Chapter 15 provides effective mechanisms for dealing with cross-border insolvency by: (1) promoting cooperation between U.S. courts and parties in interest and courts and other competent of foreign country authorities in cross-border insolvency proceeding; (2) establishing trade and investment legal certainty; (3) providing for the fair and efficient administration of cross-border insolvencies so as to protect the interests of all creditors and other interested entities, including the debtor; (4) protecting and maximizing the value of the debtor's assets; and (5) facilitating the rescue of financially troubled businesses, thereby protecting investments and preserving employment. 11 U.S.C. § 1501(a).

Chapter 15 applies to entities that can be Code debtors, but Chapter 15 protection is foreclosed to section 1501(c) listed entities:

> This chapter does not apply to—
>
> (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b); ….

11 U.S.C. § 1501(c).

Section 109, in turn, provides:

> **§ 109. Who may be a debtor.**
>
> …
>
> (b) A person may be a debtor under chapter 7 of this title only if such person is not—

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(1) a railroad; ….

11 U.S.C. § 109(b).

Based on the plain sections 1501(c) and 109(b) language, commentators have concluded that "[u]nder Chapter 15, … foreign railroads … are not permitted to pursue" such relief. Megan R. O'Flynn, *The Scorecard So Far: Emerging Issues In Cross-Border Insolvencies Under Chapter 15 Of The U.S. Bankruptcy Code*, 32 Nw. J. Int'l L. & Bus. 391, 398-99 (Winter 2012); *see also* 2 COLLIER ON BANKRUPTCY ¶ 11.03[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("Chapter 15 is not available to (1) railroads, (2) domestic insurance companies and (3) certain domestic and foreign financial institutions such as banks, savings and loan associations and clearing associations…."); Hon. Samuel L. Bufford, *Tertiary and Other Excluded Foreign Proceedings Under Bankruptcy Code Chapter 15*, 83 Am. Bankr. L.J. 165, 172 (2009) ("Section 1501(c) narrows this group [of potential foreign proceedings covered by Chapter 15] by excluding … foreign railroads ….").

Chapter 15 differs from predecessor law (section 304), which applied to entities not qualifying as section 109 debtors. *See, e.g.*, *Agency for Deposit Insurance, Rehabilitation, Bankruptcy and Liquidation of Banks v Superintendent of Banks of the State of New York*, 310 B.R. 793 (S.D.N.Y. 2004). Aware of prior law, by section 109 Congress excluded foreign railroads. MMA Canada filed for CCAA protection as a railroad and continues to avail itself of that protection. Chapter 15 therefore renders that debtor ineligible. A plan predicated on a Chapter 15 recognition and order enforcement that MMA Canada, as a foreign railroad cannot achieve, cannot be confirmed.

2. The CCAA approval order

The plan also conditions confirmation upon Canadian bankruptcy court order issuance, which MMA Canada cannot, as a matter of law, secure. In the corollary *Re Montreal Maine &*

Atlantic Canada Co. case, the Quebec Superior Court granted insolvent MMA Canada protection under the Companies' Creditors Arrangement Act (CCAA). 2013 QCCS 4039 (Que. S.C.) But the CCAA's definition of a "company" excludes railways. *See* CCAA, RSC 1985, s. 2. The Canadian court inexplicably held that despite the legislative gap insolvent railways and ordinary creditors could take advantage of CCA protection; the court invoked self-pronounced inherent jurisdiction. CP has formally challenged the subject matter jurisdiction of the Quebec Superior Court to administer the MMA Canada insolvency. Because MMA Canada's entire CCAA proceeding is *ultra vires*, a material condition precedent to confirmation of this plan can never be satisfied.

C. The best interest of creditors

Section 1173(a) permits a railroad reorganization plan confirmation if,

> (1) the applicable requirements of section 1129 of this title have been met;
>
> (2) each creditor or equity security holder will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the value of property that each such creditor or equity security holder would so receive or retain if all of the operating railroad lines of the debtor were sold, and the proceeds of such sale, and the other property of the estate, were distributed under chapter 7 of this title on such date;
>
> (3) in light of the debtor's past earnings and the probable prospective earnings of the reorganized debtor, there will be adequate coverage by such prospective earnings of any fixed charges, such as interest on debt, amortization of funded debt, and rent for leased railroads, provided for by the plan; and
>
> (4) the plan is consistent with the public interest.

11 U.S.C. § 1173(a).

This "best interest of creditors" test parallels section 1129(a)(7)'s, except "since a railroad cannot liquidate its assets and sell them for scrap to satisfy its creditors, the test focuses on the value of the railroad as a going concern. That is, the test is based on what the assets, sold as operating rail lines, would bring." H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 425 (1977).

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Section 1173 "requires that a confirmable plan provide greater value than the liquidation value of the [railroad] line." *In re Dakota Rail, Inc.*, 946 F.2d 82, 85 (8th Cir. 1991); *see also In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175 (D. Del 1991) (same).

The plan cannot satisfy the best interest of creditors test because, absent a liquidation analysis, conducting voting without a Chapter 7 liquidation favorableness analysis would be unlawful. Furthermore, settlement agreement counterparties have continuing non-court-supervised termination rights that render predicting whether settlements will ultimately hold impossible.

D. Plan exculpation provisions do not conform to section 1125(e)

Section 1125(e) provides:

> A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale or purchase of a security, offered or sold under the plan, of the debtor, of an officer participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale or purchase of securities.

11 U.S.C. § 1125(e).

The plan defines an "Exculpated Party" as "any of the Debtor, the Trustee, the Disbursing Agent, the WD Trustee, the Estate, the WD Trust, the Creditors' Committee, and their respective professionals retained after the Petition Date…." Plan § 1.69. Plan section 10.3 affords the Trustee, Creditors Committee, Monitor, MMA Canada, or the members, representatives, accountants, financial advisors, consultants and attorneys for these entities immunity from all Chapter 11 act or omission liability. *Id.* § 10.3.

Yet section 1125(e) only shields the listed entities from liability when they disclose and solicit plan acceptance. *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496 (9th Cir. 1995)

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("the plain language of section 1125(e) and its location in the section which outlines the procedures and requirements of disclosure and solicitation, both suggest that section 1125(e) only provides a safe harbor for the disclosure and solicitation process of a bankruptcy."). Section 1125(e)'s liability sanctuary does not shield bad faith. *Id.* The plan, however, seeks to enlarge exculpation to cover acts and entities going well beyond the scope of section 1125(e). The liability protection supposedly afforded encompasses much more than good faith reorganization participation. Accordingly, the plan contravenes the Bankruptcy Code and cannot be confirmed.

E. Plan feasibility

Confirmation depends on feasibility; the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor …." 11 U.S.C. § 1129(a)(11). Feasibility turns on "whether the plan is workable and has a reasonable likelihood of success." *In re Charles St. African Methodist Episcopal Church of Boston*, 499 B.R. 66, 108-09 (Bankr. D. Mass. 2013). Even a liquidation must be feasible. *In re Am. Capital Equip., LLC*, 688 F.3d 145, 156 (3d Cir. 2012).

"Uncertain and speculative" funding sources implicate unfeasibility. *See id.* Trustee Keach's plan depends on several speculative undertakings. To start with, the plan relies on settlement funding, but the terms of those agreements are shrouded. If that were not enough, the masked deals allow the settling counterparties to renege in the event of undisclosed conditions.

Next, plan viability hinges on the outcome of a host of unresolved claims. For example, the trustee's Surcharge Motion remains undecided, and the Wheeling Adversary Proceeding, asserting a security interest in debtor and MMA Canada insurance policy rights, is pending. *Disclosure Statement* at 30, 34. And the World Fuel Services adversary proceeding, in which CP was joined, plods on. *Id.* at 34-35.

In addition, the Canadian Monitor must place assets into the WD Trust in order to fund. *See, e.g.*, Plan § 5.5. The status of that payment is unclear. Finally, the plan calls for a final CCAA Approval Order and a Chapter 15 Recognition and Enforcement Order that cannot, as a matter of law, be secured. In short, the plan lacks feasibility.

F. Third party releases

The plan forces CP, a non-debtor third party, to release claims against other non-debtor third parties solely on the basis of their undisclosed financial contributions. These nonconsensual releases are impermissible. The court lacks subject matter jurisdiction to impose them; the Bankruptcy Code proscribes them; the First Circuit has not endorsed them; and, on these facts, non-controlling precedent would not support them.

1. Subject matter jurisdiction

Subject matter jurisdiction to impose releases is wanting. Bankruptcy court jurisdiction extends to four types of title 11 matters, the broadest of which is proceedings "*related to* cases under title 11." 28 U.S.C. § 1334(b) (emphasis added). "Related to" jurisdiction encompasses non-debtor third parties only when "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing *Pacor Inc. v Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)); *see In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991). The disclosure statement fails to address this jurisdictional nexus. The plan makes releases—the carrot and stick for settlement funding—a non-waivable confirmation condition, yet jurisdiction is presumed instead of established.

A debtor cannot concoct subject matter jurisdiction over a non-debtor third-party dispute simply by structuring a plan that depends on third-party contributions. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004). "Subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the

parties cannot create it by agreement even in a plan of reorganization." *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.),* 372 F.3d 154, 161 (3d Cir. 2004).

Besides that, the Bankruptcy Code's All Writs catchall, section 105(a), does not confer *jurisdiction*. Rather, a bankruptcy court only has *power* to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Code. 11 U.S.C. § 105(a); *see In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2d Cir. 1986) ("Section 105(a) does not, however, broaden the bankruptcy court's jurisdiction, which must be established separately[.]").

"Related to" jurisdiction must therefore exist independently regardless of any plan provision purporting to enjoin claims against non-debtors. *In re Zale Corp.*, 62 F.3d 746, 756 (5th Cir. 1995). Although, in order to secure more assets for derailment claimants, the trustee may want to provide injunctive relief in favor of non-debtor tortfeasors, there must be bankruptcy court jurisdiction to effect that result. Section 105(a) does not afford such prerogative.

2. Section 524

Even if subject matter jurisdiction were available (impossible to discern from the disclosure statement), Congress has spoken regarding releasing third party liability: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). This provision "precludes bankruptcy courts from discharging the liabilities of non-debtors." *In re Fred Lowenschuss*, 67 F.3d 1394, 1401 (9th. Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996). The only exception is limited to asbestos cases. *See* 11 U.S.C. § 524(g). Trustee Keach's proposed plan violates section 524(e) by purporting to release non-debtor tortfeasors from liability and enjoining other non-debtor third parties, like CP, from suing.

3. First Circuit silence

Despite section 524's prohibition, the Circuits have parted ways regarding third-party releases. The interplay between section 524 and catchall section 105(a) spawns that split. The Fifth, Ninth, and Tenth Circuits refuse to allow non-debtor releases. *See In re Zale Corp.,* 62 F.3d 746, 756 (5th Cir. 1995)*; In re Fred Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995) *cert. denied*, 517 U.S. 1243 (1996); *In re Western Real Estate Fund Inc*., 922 F.2d 592, 601 (10th Cir. 1990). In contrast, the Second, Third, Fourth, Sixth and Seventh Circuits allow such releases, but only in limited circumstances. *See In re Drexel Burnham Lambert Group Inc*., 960 F.2d 285, 292 (2d Cir. 1992); *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000); *In re A.H. Robins Co. Inc*., 880 F.2d 694, 700-02 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Specialty Equipment Cos*., 3 F.3d 1043, 1047 (7th Cir. 1993) (permitted only when creditors consent). The First Circuit has yet to weigh in.

The First Circuit has twice considered third party releases—in *In re G.S.F. Corp*., 938 F.2d 1467 (1st Cir. 1991), and in *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995). Neither precedent, however, controls or approves the trustee's gambit.

G.S.F. involved an injunction stemming from mutual releases that a debtor entered into with a secured party in connection with the settlement of an isolated environmental dispute. As authority for the injunction, the bankruptcy court relied upon section 105(a) catchall power. *See* 11 U.S.C. § 105(a). On appeal, the First Circuit noted the limitation on section 105's grant of equitable power. In order to confer jurisdiction to enjoin, the debtor's estate must be affected. But instead of analyzing that requirement, the court distinguished *G.S.F.* as follows:

> This case is somewhat extraordinary, however, as what is sought is a relitigation injunction. The justification for the injunction here is not effect on the debtor (although the presence of such an effect certainly strengthens the case for the injunction), but protection of a federal judgment. *See Toucey v. New York Life Ins. Co*., 314 U.S.

> 118, 144, 62 S.Ct. 139, 149, 86 L.Ed. 100 (1941) (Reed, J., dissenting); 17 Wright, Miller & Cooper, *Federal Practice and Procedure* Sec. 4226 (2d ed. 1988). A valid original judgment provides the federal court with the power to issue the relitigation injunction.

G.S.F. Corp., 938 F.2d at 1475. Hence, *G.S.F.* is a collateral attack case.

Monarch, another collateral attack case, involved a plan of reorganization that released a number of non-debtors, including attorneys. Post-confirmation, the debtor's wholly-owned subsidiary brought a malpractice action against the debtor's counsel. The law firm argued, and the bankruptcy court agreed, that the subsidiary violated the confirmed plan injunction. On appeal the subsidiary maintained that the bankruptcy court lacked jurisdiction to enjoin the malpractice action. The First Circuit ruled, however, that the subsidiary's failure to appeal the confirmation order estopped the action. Rather than ruling on the propriety of the injunction, the court deferred as follows:

> Though there is conflicting authority on the `jurisdictional' reach of section 105(a), the confirmation order cited precedent for a broad-based `incidental' injunctive provision . . . We express no view on the soundness of the precedents cited in the confirmation order, nor on their applicability to the particular Plan proposed by Monarch Life.

Monarch, 65 F.3d at 983.

4. Other jurisdictions

In those jurisdictions that endorse third party releases, plan proponents still face an uphill battle. Allowing non-debtor releases is the exception, rather than the rule. To confirm a plan of reorganization festooned with non-debtor releases, the debtor must demonstrate (1) that unusual circumstances exist, and (2) that the non-debtor release is fair and necessary based upon judicially developed factors. *See In re Transit Group, Inc*., 286 B.R. 811, 817 (Bankr. M.D. Fla. 2002).

In re Master Mortgage Investment Fund Inc., 168 B.R. 930, 934-937 (Bankr. W.D. Mo. 1994) (Koger, J.) (a case cited in *Monarch*), often cited by courts weighing third party releases, summarized the state of the law. Finding a *per se* rule against third party releases to be unwarranted, the court nevertheless cautioned that such a release "is a rare thing, indeed, and only upon a showing of exceptional circumstances . . ." should such a release be granted. *Id*. at 937. Before granting such relief, courts usually consider the following:

> (1) There is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the nondebtor is, in essence, a suit against the debtor or will deplete assets of the estate.
>
> (2) The non-debtor has contributed substantial assets to the reorganization.
>
> (3) The injunction is essential to reorganization. Without the [sic] it, there is little likelihood of success.
>
> (4) A substantial majority of the creditors agree to such injunction, specifically, the impacted class, or classes, has 'overwhelmingly' voted to accept the proposed plan treatment.
>
> (5) The plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction.

Id. at 935 (footnotes omitted).

Likewise, in *Lacy v. Dow Corning Corp. (In re Dow Corning Corp.)*, the debtor sought non-debtor releases for injuries caused by silicone breast implants. 280 F.3d 648 (6th Cir. 2002). In confirming the debtor's third party release plan, the Sixth Circuit cautioned that non-consensual, non-debtor releases are only appropriate in "unusual circumstances." *Id.* at 658. Conclusory statements or merely restating the test does not amount to unusual circumstances. *Id.* The release proponent must present facts regarding each released party's situation, not all released parties collectively. *Id.*

Dow Corning delineated the "unusual circumstances" as follows:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> (4) The impacted class, or classes, has overwhelmingly voted to accept the plan;
>
> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
>
> (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;
>
> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id.

Hence third party releases are only appropriate when the debtor rehabilitates, when third party indemnity claims threaten future debtor operations and cash flow, and when prospective debtor going concern value can be harnessed to pay creditors in full. Releases may not be used in a Chapter 11 liquidation as a mere expedient for resolving claims among non-debtor third parties, even if such releases bring additional money into the estate. *See In re Optical Technologies, Inc.*, 216 B.R. 989 (Bankr. M.D. Fla. 1997) (Paskay, J.) (refusing to approve releases because plan called for total liquidation of debtor); *In re Swallen's, Inc.*, 210 B.R. 123, 127 (Bankr. S.D. Ohio 1997) (same); *In re Regency Realty Associates*, 179 B.R. 717 (Bankr. M.D. Fla. 1995) (same).

Trustee Keach's disclosure statement pretends to present "unusual circumstances" so as to rationalize sweeping non-debtor releases. But MMA has already sold all assets and ceased

operation. Therefore support to exculpate non-debtors cannot be marshalled. MMA is not rehabilitating, and no future value would be protected. The plan therefore violates section 524(e).

G. Other plans

Section 1121(c) enables any party in interest to propose a plan after the trustee's appointment. Trustee Keach proposed a plan during a "moratorium" period when other parties could not file a plan. Because the moratorium precluded competing party proposals, the trustee's plan may not conform with the Code.

Conclusion

Trustee Keach's disclosure statement fails to reveal the most critical elements of the proposed plan—namely, the settlement agreements. Such lack of transparency flouts the very principles that animate federal judicial proceedings. Section 107(b)'s limited exceptions to full disclosure cannot condone the trustee's subterfuge. What is being hidden from the interested parties and why?

On top of that, the plan described in the disclosure statement evades confirmability. The show stopper starts and should end with a lack of jurisdiction. When bankruptcy protection was sought, MMA and MMA Canada were railroads. Manipulations in bankruptcy cannot shed that status. The Code does not enable a railroad to exploit Chapter 15 protection by dumping railroad operations. Jurisdiction to approve a *sine qua non* condition of the plan is lacking. A disclosure statement that describes an unconfirmable plan cannot be approved.

Dated: June 16, 2015

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:

MONTREAL MAINE & ATLANTIC RAILWAY, LTD.,

Debtor.

Chapter 11
Case No. 13-10670-PGC

Certificate of Service

I, Aaron P. Burns, counsel for Canadian Pacific Railway Company hereby certify that I have caused a copy of Canadian Pacific Railway Company's Objection To The Disclosure Statement Regarding The Trustee's March 31, 2015 Plan Of Liquidation to be served as follows.

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